UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LUISA M. WOOD	)	DOCKET NUMBER DC04328310559
v.	)	
DEPARTMENT OF THE NAVY	)	DATE: JUN 7 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis L. Devaney, Member

OPINION AND ORDER

Appellant was removed from her position of Military Personnel Clerk, GS-4, based on her alleged unacceptable performance in one of the critical elements of her position, namely, in "[d]etermining promotional eligibility of officers to be considered for selection." Appellant was charged with committing a number of errors in excess of the allowable number in her performance of that critical element. She appealed to the Washington, D.C. Regional Office of the Board alleging, inter alia: insufficiency of the evidence presented by the agency; unspecified disparate treatment; harshness of the agency action; discrimination based on unspecified national origin; unspecified prohibited personnel practice; inadequate opportunity to improve her performance; and failure of the agency to provide her with a written

performance appraisal at the end of the one-year appraisa period. The presiding official found that the agency' charge was supported by substantial evidence and tha appellant failed to support her defenses. He therefor sustained the agency action.

Appellant petitioned for review contending that th initial decision was not in accordance with law. Appellan further contended that the presiding official erred i finding that the agency did not commit harmful procedura error in affording her only thirty days in which to improve her performance and that the agency sustained its burden of proof by substantial evidence.

On review, the Board noted that the issue of whether the agency action was taken under a performance appraisal system approved by the Office of Personnel Management (OPM) was not raised before the presiding official and that the record did not establish such OPM approval. Therefore, by Order dated November 7, 1984, the Board reopened the appeal on its own motion and, pursuant to Griffin v. Department of the Army, MSPB Docket No. CH07528210163 (October 22, 1984), remanded the case to the Regional Office for the determination of this issue.

On remand, the agency submitted an affidavit by its Personnel Management Specialist stating that an OPM-approved performance appraisal plan was in effect at the time of its action against appellant and an October 8, 1980 letter from OPM approving the agency's performance appraisal plan. Also, on remand, appellant requested and was granted a motion requesting the production of documents, which was served upon the agency by order. In response to that order, the agency stated that it submitted no amendments of its performance appraisal system to OPM and that its only amendments were those made pursuant to OPM's suggestions in its October 8, 1980 approval letter.

In response to the agency's submissions, appellant contended that an OPM-approved performance appraisal plan was not in effect at the time the agency took its action against appellant. She contended that the plan was substantially amended without OPM approval on January 19, 1981, June 24, 1981, April 14, 1982, and January 28, "1972."[1/] Appellant also reiterated her contention that the agency committed harmful procedural error in failing to allow her a ninety-day improvement period, which she alleged was required by both the original and the amended appraisal plans.

In his supplemental initial decision, the presiding official found that the affidavit and the OPM approval letter submitted by the agency were equally persuasive as the evidence submitted by appellant and that the agency evidence was sufficient to establish OPM approval by substantial evidence. He therefore found that the agency sustained its burden of proof on this issue.

Appellant then filed with the Board an exception to the supplemental initial decision, alleging error by the presiding official in finding OPM approval of the appraisal system under which appellant was removed.

With respect to the agency's alleged modifications of the appraisal plan, we note that the OPM approval letter requires OPM review and approval only of subsequent changes concerning matters required by statute or regulation. See also Griffin, supra, at 7, which notes the requirement of such OPM approval. In the instant case, the agency

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1/ The presiding official found the alleged 1972 amendment irrelevant since it was in effect prior to the passage of the Civil Service Reform Act and OPM approval of the agency's appraisal system. Thus, he concluded that it could not have amended the OPM-approved appraisal system.

admitted that it modified the OPM-approved performance appraisal system. However, the agency alleged that the changes were made pursuant to OPM's suggestions in its approval letter. We note that OPM specifically stated in that letter that its suggested changes were not required by statute or regulation. Those suggestions related to the development of standards for multiple levels of performance and modificatior of the plan to clarify that, when a special review is held and any change is made in one or more critical elements, an employee's signature does not evidence agreement with the change but merely indicates that the supervisor held the special review and discussed the change with the employee.

Appellant has not shown that any of the changes made by the agency was required by statute or regulation and thus needed OPM approval. Instead, appellant alleged on remand that the agency committed harmful procedural error in allowing her only thirty days in which to improve when both the original and the amended appraisal plan provided for a ninety-day improvement period. That contention was unrelated to OPM approval of the agency's appraisal system. Further, appellant contended that the original section (V)(B)(2) of the plan required another appraisal at the end of the performance improvement period but that the amended plan provides for the supervisor to take action against the employee if performance has not improved at the end of that time. Again, appellant failed to show that those changes were required by statute or regulation and thus, under the terms of the OPM letter, needed OPM approval. Therefore, we find no error by the presiding official in determining that the agency action against appellant was taken under an OPM-approved performance appraisal system.

With respect to the petition for review, appellant's contention that the presiding official's initial decision is not in accordance with law is based on her contentions that the presiding official erred in finding that she was afforded a reasonable period of time in which to improve her performance and in finding that the agency action was supported by substantial evidence.

Appellant contends that the thirty-day period afforded her by the agency was inadequate to demonstrate acceptable performance. Under 5 U.S.C. § 4302(b)(6), a performance-based action can be taken against an employee only after the agency has afforded the employee a reasonable opportunity to show acceptable performance. That section does not specify what period of time is considered reasonable. However, this Board has held that an agency's compliance with section 4302(b)(6) is an element of proof for all 5 U.S.C. Chapter 43 actions. See Sandland v. General Services Administration, MSPB Docket No. PH0432831O205 at 4 (October 22, 1984). Thus, in this regard, the Board found that an employee's entitlement to a reasonable period of time to demonstrate acceptable performance is a substantive right. Id. at 7.

Appellant contends that additional time would have permitted her an opportunity to correct her errors. Appellant's supervisor testified, though, that appellant would also have had additional responsibilities during an extended period of time. The supervisor also testified that, upon being asked whether she had made all the corrections she intended to make, appellant indicated that she had. Appellant denied that she so indicated and testified that she requested more time. Nevertheless, the presiding official found the supervisor's testimony more credible than appellant's. The Board will accord due deference to the presiding official's credibility determinations since he

was "present to hear and observe the demeanor witnesses," and appellant has shown no error i findings. See Weaver v. Department of the 2 MSPB 297, 298-99 (1980). Thus, we find that the day improvement period was reasonable and compli 5 U.S.C. § 4302(b)(6).

Appellant contends, however, that she was entit a ninety-day performance improvement period under the agency's regulation.[2/] It is undisputed that appella afforded only a thirty-day improvement period. Thus, t the agency's regulation required a ninety-day impro period, the agency committed procedural error in f to comply therewith. Appellant bears the burden of p that the agency's procedural error caused substantial to her rights, i.e., that the agency would likely rea different conclusion in absence of the error. See 5 C § 1201.56(c)(3); Parker v. Defense Logistics Ag 1 MSPB 489, 492-93 (1980). A mere showing that there a possibility of prejudice is insufficient. See Pa id. at 493. As we have found, appellant has not shown additional time would have permitted her to improve performance and thus would have caused the agency no take the removal action. Therefore, appellant has not s harmful error by the agency in failing to afford her a ni day improvement period.

2/ The presiding official noted that although the age had ample opportunity to respond to appellant's allegati the agency failed to do so until after the hearing. therefore rejected the agency's submissions showing t the regulation in question had been superseded. The age has not challenged this sanction. Therefore, it will r be further considered.

Appellant has also alleged numerous other factual and credibility errors by the presiding official. However, the presiding official's factual and credibility determinations will be accorded due deference absent a showing of a serious evidentiary question. See Weaver, supra, at 298-300. Our review of appellant's allegations indicates no serious evidentiary issue. Also, even if appellant had shown error, we note that appellant has not shown that her substantive rights were harmed thereby. See Karapinka v. Department of Energy, 6 MSPB 114, 115-16 (1981). Thus, appellant has not shown that a full review of the record is warranted in this case.

Accordingly, appellant's petition for review is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race,

color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e-5(f)-(k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.